PB Securities Sdn Bhd v Lee Kwee Heng

HIGH COURT (KUALA LUMPUR) — SUIT NO D10(D1)–22–4748 OF 1998
APANDI ALI J
6 AUGUST 2009

Civil Procedure — Summary judgment — Application for — Determination of questions of law — Defendant entered into remisier's agreement with plaintiff stock broking company — Losses sustained in margin accounts — Defendant failed to settle outstanding amount — Whether defendant bound by indemnities given to plaintiff under remisier's agreement — Whether plaintiff breached remisier's agreement — Whether trading transactions illegal because contravened ss 38(2), 84, 85 and 87A of the Securities Industry Act 1983

The defendant was a licensed remisier with the plaintiff stockbroker company. The plaintiff and defendant executed a remisier agreement dated 15 February 1995, which enabled the latter to buy and sell shares on the KLSE. Some time in February 1997, the plaintiff granted margin facilities to four clients pursuant to the defendant's recommendations. When losses were sustained in the margin accounts of two of the four clients ('the said margin accounts') the plaintiff asked the defendant to settle the outstanding amount and/or to top up his build-up account. When the defendant failed to rectify the deficit position, the plaintiff terminated the defendant's services after giving him the requisite period of notice. The plaintiff then commenced a civil suit against the defendant to recover the indemnity sum of RM2,278,315.40, being losses sustained in the said margin accounts. The defendant's liability to the plaintiff was based on the indemnities given by him under the remisier's account and in separate letters of indemnity. The defendant in his defence alleged that he was at all material times acting as the plaintiff's agent in conducting the principal's business and that the losses incurred in the said margin accounts were as a result of the breach on the part of the plaintiff. He further averred that his indemnity under the remisier's agreement would only cover all losses suffered by the plaintiff in the said margin accounts to the extent where the accounts were not tainted with illegality and where there was no breach of the remisier's agreement on the part of the plaintiff but since the plaintiff had breached the agreement and also contravened ss 38(2), 84, 85 and 87A of the Securities Industry Act 1983 ('the Act') and Regulations the remisier's agreement was rendered illegal and null and void under ss 24 and 25 of the Contracts Act 1950. The defendant further alleged that he had been wrongly suspended from doing any

purchasing share transactions for his clients. The defendant therefore counterclaimed against the plaintiff for certain declarations, inter alia, that the trading and transactions under the said margin accounts were illegal and damages. Thereafter, the plaintiff made the instant application under O 14A of the Rules of the High Court 1980 to have its claim summarily heard without a full trial. In this application three questions were raised to determine the entire action. These questions required the court to consider whether the defendant was bound by the indemnities he had given to the plaintiff under the remisier's agreement; whether the plaintiff had breached the remisier's agreement; and whether the transactions were illegal because they contravened ss 38(2), 84, 85 and 87A of the Act.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) The defendant who had alleged that the plaintiff was in breach of the remisier's agreement had the burden of proving it but he failed to discharge the burden. Based on the facts of the case, it was clear that the defendant was acting upon the instructions of his clients and not the plaintiff and thus was in fact an agent of the clients and not the plaintiff's agent as he had alleged. Further the defendant had full knowledge and control of all transactions in the said margin accounts as is proven by the memorandums from the defendant to the plaintiff. As such, the plaintiff did not breach the remisier's agreement, which was lawful and binding on the defendant, and the defendant was bound by the indemnities he had given to the plaintiff under the agreement (see paras 14–15).

(2) The evidence adduced showed that the defendant conducted all the transactions in the said margin accounts. Thus the plaintiff did not contravene ss 38(2), 84, 85 and 87A of the Act and the defendant had failed to prove that the transactions were tainted with illegality (see paras 23–24).

(3) The defendant was aware of the losses in the said margin accounts and was given ample time and opportunity by the plaintiff to rectify the position but failed to do so. Thus the plaintiff had rightly exercised its right under the remisier's agreement to terminate the defendant's services (see para 25).

[Bahasa Malaysia summary

Defendan merupakan remisier berlesen dengan syarikat broker saham plaintif. Plaintif dan defendan menandatangani perjanjian remisier bertarikh 15 Februari 1995, yang membolehkan defendan membeli dan menjual

saham dalam KLSE. Sekitar Februari 1997, plaintif memberikan kemudahan-kemudahan margin kepada empat klien mengikut cadangan defendan. Apabila kerugian ditanggung dalam dua daripada empat akaun margin klien ('akaun-akaun margin tersebut') plaintif meminta defendan untuk menyelesaikan jumlah belum jelas dan/atau menambah akaun 'build-up'nya. Apabila defendan gagal untuk memperbaiki kedudukan defisit, plaintif menamatkan perkhidmatan defendan selepas memberikan tempoh notis seperti yang diperlukannya. Plaintif kemudiannya memulakan guaman sivil terhadap defendan untuk mendapatkan jumlah indemniti RM2,278,315.40, sebagai kerugian yang ditanggung dalam akaun-akaun margin tersebut. Liabiliti defendan kepada plaintif berdasarkan indemniti-indemniti yang diberikan olehnya di bawah akaun remisier dan surat-surat indemniti yang berasingan. Defendan dalam pembelaannya menghujah bahawa dia pada masa matan bertindak sebagai ejen plaintif dalam mengendalikan perniagaan utama dan bahawa kerugian yang dialami dalam akaun-akaun margin tersebut merupakan pelanggaran daripada pihak plaintif. Dia selanjutnya menegaskan bahawa indemnitinya di bawah perjanjian remisier hanya boleh menampung semua kerugian yang dialami oleh plaintif dalam akaun-akaun margin sehingga tahap di mana akaun-akaun tersebut tidak dicacatkan dengan kepenyalahan undang-undang dan apabila tiada pelanggaran perjanjian remisier dari pihak plaintif, tetapi memandangkan plaintif telah melanggar perjanjian dan bercanggah dengan ss 38(2), 84, 85 dan 87A Akta Perindustrian Sekuriti 1983 ('Akta') dan Peraturan-Peraturan, maka perjanjian remisier dianggap menyalahi undang-undang, batal dan tak sah di bawah ss 24 dan 25 Akta Kontrak 1950. Defendan selanjutnya menghujah bahawa dia telah digantung secara salah daripada membeli transaksi saham untuk klien-kliennya. Oleh itu defendan menuntut balas terhadap plaintif untuk deklarasi-deklarasi tertentu, bahawa dagangan dan transaksi-transaksi di bawah akaun-akaun margin adalah menyalahi undang-undang dan juga menuntut ganti rugi. Kemudiannya, plaintif membuat permohonan segera di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 supaya permohonannya dibicarakan terus tanpa perbicaraan penuh. Dalam permohonan ini tiga soalan dibangkitkan untuk menentukan kesemua tindakan. Soalan-soalan ini memerlukan mahkamah untuk mempertimbangkan sama ada defendan terikat dengan indemniti-indemniti yang diberikannya kepada plaintif di bawah perjanjian remisier; sama ada plaintif melanggar perjanjian remisier; dan sama ada transaksi-transaksi tersebut menyalahi undang-undang kerana bercanggah dengan ss 38(2), 84, 85 dan 87A Akta.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) Defendan yang mendakwa bahawa plaintif melanggar perjanjian

remisier mempunyai beban untuk membuktikannya tetapi dia gagal untuk melepaskan beban tersebut. Berdasarkan fakta-fakta kes, adalah jelas bahawa defendan bertindak atas arahan klien-kliennya dan bukannya plaintif dan oleh itu dia merupakan ejen klien-klien dan bukannya ejen plaintif seperti yang dihujahkannya. Selanjutnya defendan mempunyai pengetahuan penuh dan kawalan ke atas kesemua transaksi dalam akaun-akaun margin tersebut seperti yang dibuktikan melalui memorandum-memorandum daripada defendan kepada plaintif. Oleh itu, plaintif tidak melanggar perjanjian remisier, yang mana adalah sah dan mengikat defendan, dan defendan terikat dengan indemniti-indemniti yang diberikannya kepada plaintif di bawah perjanjian (lihat perenggan 14–15).

(2) Keterangan yang dikemukakan menunjukkan bahawa defendan telah menjalankan semua transaksi dalam akaun-akaun margin tersebut. Oleh itu plaintif tidak melanggar ss 38(2), 84, 85 dan 87A Akta dan defendan gagal membuktikan bahawa transaksi-transaksi tersebut dicacatkan dengan kepenyalahan undang-undang (lihat perenggan 23–24).

(3) Defendan sedar mengenai kerugian dalam akaun-akaun margin tersebut dan diberikan masa dan peluang mencukupi oleh plaintif untuk memperbaiki kedudukan tersebut tetapi defendan gagal berbuat demikian. Oleh itu plaintif telah menggunakan haknya dengan betul di bawah perjanjian remisier untuk menamatkan perkhidmatan defendan (lihat perenggan 25).]

Notes

For cases on application for, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7056–7104.

Legislation referred to

Contracts Acts 1950 ss 24, 25, 164, 175, 176, 178
Rules of the High Court 1980 O 14A
Securities Industry Act 1983 ss 9B, 13, 38(2), 84, 85, 87A

R Ravindra (Raja Darryl & Loh) for the plaintiff.
R Rengadharan (R Kengadharan & Co) for the defendant.

Apandi Ali J:

ENCLOSURE 48

[1] This enclosure is an application made pursuant to the plaintiff's earlier application for the determination of this action under O 14A of the Rules of the High Court which was allowed by this court way back on 6 December

A 2005.

BACKGROUND OF CASE

B **[2]** The plaintiff is a stockbroker company and a member of the KLSE.

[3] The defendant was a remisier with the plaintiff's company and he is licensed by the Securities Commission under s 13 of the Securities Industry Act 1983 as a representative of the plaintiff to deal in securities.

C

[4] The defendant conducted share buying and selling on the KLSE through a remisier agreement dated 15 February 1995, executed between the plaintiff and the defendant.

D **[5]** On or about February 1997, the plaintiff granted margin facilities to Tan Hun Leong, Lim Kee Peng, Ong Kee Chak and Tai Seng Chai pursuant to the defendant's recommendations.

[6] The plaintiff's claim against the defendant is for the losses sustained in E the margin accounts of Tan Hun Leong and Lim Kee Peng.

[7] The defendant's counterclaim against the plaintiff is for certain declaration, inter alia, that the trading and transactions under the margin accounts were illegal and null and void. The defendant also claimed for F damages.

[8] The plaintiff's submission in brief are as follows:

G (a) The defendant is bound to pay to the plaintiff as claimed pursuant to the indemnities given by him to the plaintiff in the following documents:

(i) the remisier's agreement;

H

(ii) the margin facility application forms of Tan Hun Leong and Lim Kee Peng; and

(iii) the separate letters of indemnity.

I (b) All the transactions in the said clients, margin accounts were conducted by the defendant based on the instructions of the said clients and instructions of Tan Seng Chai and Ong Kee Chak to him.

(c) Neither the defendant nor the said clients have ever disputed and/or raised any objections as regards to the force selling at all material times.

(d) The draft policies and guidelines on share margin financing is an internal and confidential matter and it cannot be enforced against the plaintiff. The plaintiff had at all material times complied with r 20 of the KLSE Rules. The breaches of the KLSE Rules does not invalidate the transactions conducted in the said clients margin accounts neither does it affect and/or vary the defendant's indemnities to the plaintiff.

(e) Section 9B of the Securities Industry Act 1983 deals with the duties imposed on the KLSE and is therefore not applicable insofar to the plaintiff, as a stock and sharebroker.

(f) As regard s 38(2) of the Act, the contract notes were issued by the plaintiff in respect of all the transactions conducted in the said clients margin accounts and that the said contract notes were collected by the defendant on behalf of the said clients.

(g) The plaintiff did not contravene the provisions of ss 84, 85 and 87A of the Act and that it was the defendant who had contravened the said provisions as it was the defendant who conducted all the transactions in the said clients margin accounts on their instructions.

(h) The defendant who was aware of the losses in the said clients margin accounts, was given ample time and opportunity to settle the said losses and/or to top up his build up account with the plaintiff in order to rectify the deficit position.

(i) The defendant was required to have a build up account with the plaintiff pursuant to the remisier's agreement in order to enable the plaintiff to utilises the sums in the said account to settle fully or partially any losses in the defendant's clients accounts and/or for any expenses.

(j) Due to the prolonged failure of the defendant to settle the outstanding amount under the said clients margin accounts and/or to top up his build up account in order to rectify the deficit position, the plaintiff terminated the services of the defendant with effect from 30 April 1999 by giving the defendant the requisite period of notice.

(k) The defendant's counterclaim is unmeritorious, not bona fide and intended to detract from his own liability towards the plaintiff.

[9] The defendant's submissions, in brief are as follows:

(a) The defendant was in fact the agent of the plaintiff. Agent's duty in conducting principal's business under s 164 of the Contracts Act 1950. The defendant's indemnity must be read together with sub-cl 5 (i) and (v) of cl 6, where the indemnity should cover all losses suffered by the plaintiff in the two margin confidential accounts only to the extent to

where the accounts were not tainted with illegality and where there is no breach of the remisiers agreement on part of the plaintiff.

(b) No force selling was ever done by the plaintiff for more than one month between 22 April 1998 and 25 May 1998 and thus violated cll 10(b), 10(d), 10(e) and 15(a) and 15(b) of the margin facility agreement.

(c) The plaintiff had contravened s 38(2) of the Security Industry Act 1983 and Regulations wherein the contract notes for the share transactions for the four illegal confidential numbered margin accounts were not issued in the name and address of the beneficiary.

(d) The plaintiff had breached the remisier's agreement, cll 7(a), 10, and 15(b) of the margin facility agreement, violated the KLSE r 20 on trading on margin accounts, and also contravened ss 38(2), 84, 85 and 87A of the Security Industry Act 1983 and Regulations. The said breaches has rendered the remisier's agreement illegal, null and void under ss 24 and 25 of the Contracts Act 1950.

(e) The plaintiff had full control of the said clients in term of operations and the defendant had acted in good faith on the directives and blessings of the plaintiff on share transactions in these margin accounts as provided under ss 175, 176 and 178 of the Contracts Act 1950.

(f) The document known as policies and guidelines on share margin financing was not a draft but was a copy, which the plaintiff issued to all remisiers including the defendant.

(g) The plaintiff knowingly assisted and abetted with their clients to operate illegally four confidential numbered margin accounts vide manipulative and deceptive devices in the documentation of purchases and sales of shares in the KLSE. The plaintiff knowingly assisted, permitted and abetted with their four clients as a group in conducting 'married deals' without any change in the beneficial ownership within themselves in the group.

(h) On 28 May 1998, the defendant was wrongly suspended from doing any purchasing shares transactions for clients in the remisier normal trading account based on the remisier build up account.

(i) The plaintiff had illegally set off almost immediately the losses incurred by the clients against the defendant's build up account amounting to RM170,490.68 and called upon the defendant's bank guarantee of RM100,000 on 23 July 1998.

ISSUES

[10] As identified and ordered by the court, vide encl 46 that was given on

6 December 2005, three questions that need to be determined in order to finally determine the entire action, under O 14A of the Rules of the High Court, are as follows:

(a) Whether the defendant is bound by his indemnities given to the plaintiff under the remisiers agreement?

(b) Whether the plaintiff had breached the said remisiers agreement?

(c) Whether the transactions were tainted with illegality by virtue of contraventions of ss 9B, 38(2), 84, 85 and 87(A) of the Securities Industry Act 1983?

FINDINGS

[11] Upon perusal of the cause papers the court made the following findings:

(a) The plaintiff's claims against the defendant is for the indemnity sum of RM2,278,315.40, being losses sustained in the margin accounts of Tan Hun Leong and Lim Kee Peng.

(b) The liability of the defendant towards the plaintiff is based on the indemnities given by him to the plaintiff in the various documents, namely:

(i) The remisier's agreement dated 15 February 1995 (pp 5–11 of Ikatan Dokumen Bersama (IDB) Vol A).

(ii) The margin facility application forms of the Tan Hun Leong and Lim Kee Peng (pp 12–12a & 36–36(a) of IDB Vol A).

(iii) The separate letters of indemnity (pp 15 & 39 of IDB Vol A).

[12] There is no dispute with regards to the above said documents. Thus, all parties are bound by the terms and conditions of these documents.

On question No 1

[13] *The defendant is bound by his indemnities* given to the plaintiff by virtue of *cl 6 of the remisier's agreement*. The defendant contends that cl 6 of the said agreement must be read together with *sub-cl 5(i) and 5(v)*. Reading *cll 5 and 6* together it is reasonable to conclude that the indemnity should cover all losses suffered in the two margin accounts only to the extent where the accounts were not tainted with illegality and where there is no breach of

A the said agreement on the part of the plaintiff.

On question No 2

B **[14]** The issue arise as to *whether the plaintiff had contravened the said remisier's agreement*? It is trite law that 'he who asserts, must prove ...' Thus, the burden of prove is upon the defendant to show the breach on the part of the plaintiff. The defendant claimed that the losses incurred in the said clients margin accounts were as a result of a breach on part of the plaintiff. The defendant contends that he was only the plaintiff's agent. However, based on C the facts of the case, it is clear that the defendant acting upon the instructions of his clients. Thus, the defendant in fact an agent of his clients, and not the plaintiff. The defendant had full knowledge and control of all transactions in the said clients' margin accounts. This fact is proven by the memorandums from the defendant to the plaintiff stating that he was instructed to avoid D margin calls and/or force selling in respect of the said clients margin accounts if necessary:

(a) The memorandum dated 9 June 1998 (see pp 343 and 344 of IDB Vol B).

E (b) The memorandum dated 22 June 1998 (see p 348 of IDB Vol B)

(c) The memorandum dated 22 July 1998 (see pp 421–423 and 422 of IDB Vol B).

F **[15]** Therefore, it can be concluded that the defendant is not entitled to rely on ss 175, 176 and 178 of the Contracts Act. Inter alia, the remisier's agreement is lawful, valid and binding on the defendant.

On question No 3

G

[16] The last issue, whether the transactions were tainted with illegality by virtue of contraventions of ss 9B, 38(2), 84, 85 and 87(A) of the Securities Industry Act 1983? Sections 9B of the SIA reads:

H 9B Duties of stock exchange

(1) It shall be the duty of the stock exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities that are traded through its facilities.

I (2) In performing its duty under subsection (1), the stock exchange shall —

(a) act in the public interest having particular regard to the need for the protection of investors; and

(b) ensure that where any interests that it is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.

(3) It shall be the duty of the stock exchange to take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules;

(4) A stock exchange shall immediately notify the Commission if it becomes aware of —

(a) any matter which adversely affects, or is likely to adversely affect, the ability of any participating organization to meet its obligations in respect of its business of dealing in securities, including the ability of any participating organization to comply with the minimum financial requirements as may be prescribed under this Act; or

(b) any irregularity, breach of any provision of the securities laws or the rules of the stock exchange or recognized clearing house, or any other matter which, in the opinion of the stock exchange, indicates or may indicate, that the financial standing or financial integrity of any participating organization or of the chief executive or directors of the participating organization, as the case may be, is in question or may reasonably be affected.

(5) Without prejudice to subsection (4), when a stock exchange expels, or suspends any participating organization, or otherwise disciplines any of its participating organizations, it shall, within seven days, give to the Commission in writing the following particulars:

(a) the name of the member;

(b) the reason for and the nature of the action taken;

(c) the amount of the fine;

(d) the period of suspension, if any; and

(e) any other disciplinary action taken.

(6) A stock exchange shall at all times have sufficient financial, human and other resources to ensure the provision of —

(a) an orderly and fair market in relation to securities that are traded through its facilities;

(b) adequate and properly equipped premises for the conduct of its business;

(c) competent personnel for the conduct of its business; and

A (d) automated systems with adequate capacity, security arrangements and facilities to meet emergencies.

[17] This section only deals with the duties imposed on the KLSE and is B therefore not applicable insofar as the plaintiff, a stock and share broker is concerned. Thus, this section is irrelevant.

[18] The defendant also contends that the plaintiff had contravened s 38(2) of the Securities Industry Act 1983 wherein the contract notes for the share C transactions of the four illegal numbered confidential accounts were not issued in the name and address of the beneficiary. Section 38(2) of the Act reads as follows:

38 Issues of contract notes

D (2) A dealer or a fund manager referred to in subsection (1) shall comply with the requirements of any regulations made under subsection (1).

[19] The accounts that were opened with the Malaysian Central E Depository for the said clients were nominee accounts (PB Securities Nominees (Tempatan) Sdn Bhd) and therefore the addresses had to be that of the plaintiff's.

[20] The defendant contends that the plaintiff knowingly assisted and F abetted with their clients to operate illegally four confidential numbered margin accounts vide manipulative and deceptive devices in the documentation of purchases and sales of shares in the KLSE. The defendant also alleged that the plaintiff knowingly assisted and abetted with the clients in the group in conducting 'married deals' without any change in the G beneficial ownership between themselves. All these share transactions were alleged to be in contravention of ss 84 and 85 of the Securities Industry Act 1983. Sections 84 and 85 of the Act read as follows:

84 False trading and market rigging transaction

H (1) Subject to section 87B, no person shall create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in Malaysia or a false or misleading appearance with respect to the market for, or the price of, any such securities.

I (2) A person shall not, by means of purchases or sales of any securities that do not involve a change in the beneficial ownership of those securities, or by any fictitious transactions or devices, maintain, inflate, depress, or cause fluctuations in, the market price of any securities.

(3) Without affecting the generality of subsection (1), a person who —

(a) effects, takes part in, is concerned in or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;

(b) makes or causes to be made an offer to sell any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to purchase the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price; or

(c) makes or causes to be made an offer to purchase any securities at a specified price where he has made or caused to be made or proposes to make or to cause to be made, or knows that a person associated with him has made or caused to be made or proposes to make or to cause to be made, an offer to sell the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price, shall be deemed to have created a false or misleading appearance of active trading in securities on a stock market.

(4) In a prosecution of a person for an act referred to in subsection (3) it is a defence if the defendant establishes that —

(a) the purpose or purposes for which he did the act was not, or did not include, the purpose of creating a false or misleading appearance; and

(b) he did not act recklessly, whether or not he created a false or misleading appearance, of active trading in securities on a stock market.

(5) A purchase or sale of securities does not involve a change in the beneficial ownership for the purposes of this section if a person who had an interest in the securities before the purchase or sale, or a person associated with the first mentioned person in relation to those securities, has an interest in the securities after the purchase or sale.

(6) In a prosecution for an offence against subsection (2) in relation to a purchase or sale of securities that did not involve a change in the beneficial ownership of those securities, it is a defence if the defendant establishes that the purpose or purposes for which he purchased or sold the securities was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.

(7) The reference in paragraph (3)(a) to a transaction of sale or purchase of securities includes —

(a) a reference to the making of an offer to sell or purchase securities; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or purchase securities.

85 Stock market manipulations

(1) Subject to section 87B, no person shall effect, take part in, engage in, be concerned in, or carry out, either directly or indirectly, any number of transactions in securities of a corporation, being transactions that have, or are likely to have, the effect of —

(a) raising;

(b) lowering; or

(c) pegging, fixing, maintaining or stabilising, the price of securities of the corporation on a stock market in Malaysia, for the purpose or purposes which may include the purpose of inducing other persons, whether or not another person is induced, to acquire or dispose of the securities of the corporation or of a related corporation.

(2) A reference in this section to a transaction, in relation to securities of a corporation, includes —

(a) a reference to the making of an offer to sell or purchase such securities of the corporation; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or purchase such securities of the corporation.

[21] From the cause papers, it seems that all information pertaining to the said clients' margin accounts which are numbered accounts including the identity of the beneficial owners would be furnished by the plaintiff upon request. This is evident from the following documents:

(a) a letter dated 28 July 1997 from Hotline Furniture Bhd requesting for the disclosure of more than 100,000 shares in the company (see p 668 of IDB Vol C);

(b) the memorandum dated 11 August 1997 from the plaintiff to the defendant (see p 667 of IDB Vol C); and

(c) the letter dated 18 February1998 and 18 August 1997 from the plaintiff to TACS Corp Bhd and Hotline Furniture Bhd (see pp 584A–584C of IDB Vol B).

[22] The defendant's contention that the address of these four margin accounts were the plaintiff's address which the plaintiff knew and made an untrue statement of a material facts and had contravened s 87A of the Act. Section 87A of the Act reads as follows:

> 87A Use of manipulative and deceptive devices
>
> Subject to section 87B, it shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities —
>
> (a) to use any device, scheme or artifice to defraud;
>
> (b) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

[23] From evidence adduced, I conclude that the plaintiff did not contravene ss 84, 85 and 87A of the Act and that it was the defendant who had conducted all the transactions in the said clients' margin accounts. At all material times, the defendant had full control of the said clients' margin accounts and all orders by the said clients were handled by him. This is evident by the following documents:

(a) statements pertaining to the business done by remisier Lee Kwee Heng for the period of 31 July 1997 to 28 May 1998 (see pp 572, 578, 580 and 582–583 of Vol B IDB);

(b) the conformation of transactions for the period of 2 June 1997 to 28 May 1998 (pp 723, 726–728, 731, 733, 735–737, 745, 747–748, 751, 755–758, 764–781, 796–801, 803, 805, 813–816, 818, 820, 823–825, 853–859, 868–869 and 871–872 of Vol C IDB);

(c) the purchase reports for the period of 2 June 1997 to 13 February 1998 (see pp 724–725, 729–730, 732, 734, 746, 817 and 819 of Vol C IDB).

[24] Thus, it is reasonable to conclude that the *defendant have failed to prove that the transactions* were tainted with illegality and/or contravened ss 9B, 38(2), 84, 85 and 87A of the Securities Industry Act 1983.

[25] The defendant also alleged that he was wrongfully suspended from doing any purchasing shares transactions for clients. The defendant, who was aware of the losses in the said clients' margin accounts, was given ample time and opportunity to settle the said losses and/or to top up his build up account with the plaintiff in order to rectify the deficit position. In the light of the defendant's failure to do so, the plaintiff is at liberty to exercise its discretion pursuant to *cl 4 of the remisier's agreement* and to restrict the defendant's trading. Due to the prolonged failure of the defendant to settle the outstanding amount under the said clients margin accounts and/or to top up his build up account in order to rectify the deficit position, the plaintiff has rightly exercised its right under *cl 12 of the remisier's agreement* and terminated the services of the defendant with effect from 30 April 1999 by giving the defendant the requisite period of notice (see *notice of termination in pp 395–398 of IDB Vol B*).

CONCLUSION

[26] Based on the above findings, I conclude that the answers to the three questions posed, under O 14A of the Rules of the High Court, are as follows:

(a) To question No 1, the answer is in the positive, ie the defendant is bound by the indemnities given.

(b) To question No 2, the answer is in the negative, ie the plaintiff did not breached the remisiers agreement dated 15 February 1995, executed between the plaintiff and the defendant.

(c) To question No 3, the answer is also in negative, ie all the transactions were not tainted with illegality and therefore not in contravention of the various sections of the Securities Industry Act 1983, referred to.

[27] In the light of the above determinations, pursuant to O 14A of the High Court Rules, and as agreed on the quantum of claim (as evident in para 16 of encl 55), the plaintiff's claim for the sum of RM2,278,315.40 is hereby allowed with costs and accordingly the defendant's counterclaim is dismissed with costs.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed with costs.

Reported by Kohila Nesan